



Digital Commons @ Touro Law Center

Scholarly Works

Faculty Scholarship

1995

The Constitution of Belarus: A Good First Step Towards the Rule of Law

Gary M. Shaw
Touro Law Center, gshaw@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>

 Part of the [Constitutional Law Commons](#), and the [International Law Commons](#)

Recommended Citation

6 Touro Int'l L. Rev. 125 (1995)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

THE CONSTITUTION OF BELARUS: A GOOD FIRST STEP TOWARDS THE RULE OF LAW

Professor Gary M. Shaw*

CONTENTS

INTRODUCTION

The disintegration of the Soviet Union and the concomitant emergence of the Commonwealth of Independent States (CIS) has resulted in the creation of new Republics struggling to adapt to a radically changed world.¹ Belarus is one of those republics struggling in the new world into which it has been thrown.

One aspect of this change is a consensus by Belarussian leaders that the former Soviet Constitution lacks political and moral legitimacy. This led to the drafting of a new proposed Belarussian Constitution. The drafters² of the proposed Constitution aspired to create a democratic state ruled by law.³

* Gary M. Shaw is a Professor of Law at Touro College, Jacob D. Fuchsberg Law Center, Huntington, New York. In 1993, Professor Shaw spent three months in Minsk, Belarus, working with the Constitutional Committee as a Constitutional Law Specialist on Behalf of the Central and East European Law Initiative (CEELI), a project of the American Bar Association.

1. For a brief overview, see Ludwikowski, Rett R., *Constitution Making in Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT'L & COMP. L. 155 (1993).

2. The proposed Constitution was drafted by the Constitutional Commission of the Belarussian Supreme Soviet. The Commission consisted of 74 people, including 63 Deputies of the Supreme Soviet, 7 legal scholars, and the Minister of Justice, the Procurator General, the head of the Legal Department of the Council of Ministers, and the head of the Union of Lawyers in the Republic.

3. "We, the people of the Republic of Belarus, . . . wishing to guarantee civil concord, the unshakable foundation of democracy and of a State ruled by law, hereby adopt this Constitution - the Fundamental Law of the Republic of Belarus." BELARUS CONST., pmbl.

The purpose of this article is to determine how well the Constitution achieves this goal. To measure how closely the drafters have succeeded in this goal, there are two aspects of the Constitution that must be examined. The first aspect deals with protection of basic civil liberties for citizens. The second deals with how effectively the Constitution creates Separation of Powers and guarantees the rule of law in the Republic.

The observations in this article are the product of my work with the Constitutional Commission in drafting the Constitution. My involvement in this project may cause me to be biased, but I hope that any such bias is minimal. Although the Constitution is not perfect, I believe it is a good document and, despite its shortcomings, it is a strong step in the direction of a democratic state ruled by law.

I. CIVIL LIBERTIES IN THE CONSTITUTION OF THE REPUBLIC OF BELARUS

Section II of the Constitution is entitled "The Individual, Society and the State."⁴ The Articles in this Section are intended to govern the relationship between the individual and the state with that of the individual and society. The provisions in Section II of the Constitution fall within three major categories: The Rights of Individuals; The Duties of the Government and of Citizens; and the Duties of Citizens.⁵ The Articles within the category of the Rights of the Individual include such limitations as the government's power to restrict citizens' civil liberties. For example, these provisions govern issues such as freedom of speech,⁶ freedom of religion⁷ and freedom of association.⁸ The Articles within the

4. BELARUS CONST. § II.

5. The Constitution does not expressly create these categories. Rather, the Articles deal with different aspects of citizenship that fall into these three categories.

6. BELARUS CONST. § II, art. 33, ¶ 1 provides that "[e]very person is guaranteed freedom of opinions and convictions and has the right to freely voice them."

7. BELARUS CONST. § II, art. 31 provides that "[e]very person shall have the right to independently determine his (her) religion . . . profess any religion

category of the Duties of the Government and of Citizens essentially encompass economic guarantees. For example, these include guarantees⁹ of housing,¹⁰ education¹¹ and employment.¹² The Articles which fall within the Duties of Citizens set forth what is expected from the people of Belarus. For example, these Articles require people to pay taxes¹³ and serve in the military.¹⁴

A. The Rights of Individuals

The Belarussian Constitution has a lengthy list of protected civil liberties with the purpose of restricting governmental power and

or not profess any, to express and disseminate his (her) religious convictions, and to take part in the religious services and ceremonies.”

8. BELARUS CONST. § II, art. 36, ¶ 1 provides that “[e]very person shall have the right to freedom of association.”

9. The Constitution utilizes language stating that citizens have the right to housing, education and employment. Notwithstanding the fact this language is couched in terms of the rights of citizens, the practical effect is to require the Government to provide them for the Belarussian people. Thus, they are actually in the nature of duties required by government.

10. BELARUS CONST. § II, art. 48, ¶ 1 provides in pertinent part that the “[c]itizens of the Republic of Belarus shall have the right to housing. This right shall be secured by the development of state, communal and private housing, and by providing assistance to citizens in acquisition of dwellings.”

11. BELARUS CONST. § II, art. 49 provides that:

Every one person shall have the right to education.

Accessible and free general secondary, as well as technical education, shall be guaranteed.

Secondary specialized and higher education shall be accessible for all in accordance with the capabilities of each. Each person may, on a competitive basis, receive the corresponding free education in state educational institutions.

12. BELARUS CONST. § II, art. 41, ¶ 1 provides that the “[c]itizens of the Republic of Belarus shall be guaranteed the right to work as the most suitable means for the self-affirmation of a person, that is the right to choose of one’s profession, occupation and job.”

13. BELARUS CONST. § II, art. 56 provides that “[c]itizens of the Republic of Belarus should take part in providing money for public expenditures by paying state taxes, duties and other payments.”

14. BELARUS CONST. § II, art. 57, ¶ 1 provides that “[i]t shall be the responsibility and sacred duty of a citizen of the Republic of Belarus to defend the Republic of Belarus.”

guaranteeing civil liberties. The existence of such guarantees indicates an intent that the Government be able to improperly infringe upon certain fundamental human rights. Although the drafters have sought to ensure this, it is not clear that the Constitution does, in fact, achieve this goal.

The list of guaranteed civil liberties is seemingly complete. The Constitution includes guarantees of equal protection under the law;¹⁵ judicial examination of the legality of the person's detention or arrest (habeas corpus provisions);¹⁶ prohibitions against torture and other cruel and inhumane punishment;¹⁷ a presumption of innocence in criminal cases;¹⁸ protections against forced self-incrimination and incrimination of members of one's family and close relatives;¹⁹ guarantees of the inviolability of one's home;²⁰ and guarantees of freedom of religion,²¹ speech,²² and association.²³ Furthermore, there is an excellent statement outlining a person's right to counsel,²⁴ that is far more explicit and

15. BELARUS CONST. § II, art. 22 provides that "[a]ll shall be equal before the law and have the right, without any discrimination, to equal protection of their rights and legitimate interests."

16. BELARUS CONST. § II, art. 25, ¶ 2 provides that "[a] person held in custody shall have the right to judicial examination of the legality of his (her) detention or arrest."

17. BELARUS CONST. § II, art. 25, ¶ 3 provides that "[n]o one shall be subject to torture or any treatment or punishment that is cruel, inhumane, damaging to one's human dignity; no medical or other experiments shall be carried out on a person without his (her) consent."

18. BELARUS CONST. § II, art. 26 provides that "[n]o one shall be considered guilty of a crime until his guilt is proven by law and determined by a court judgment which has come into effect. A defendant shall not be required to prove his (her) innocence."

19. BELARUS CONST. § II, art. 27 provides in pertinent part that "[n]o one shall be forced to give testimony and explanation against himself, members of his family, near relations."

20. BELARUS CONST. § II, art. 29 provides that "[t]he inviolability of the home and other legitimate property of citizens shall be guaranteed. No one shall without lawful grounds, enter a dwelling and other legal property of a citizen against such citizen's will."

21. BELARUS CONST. § II, art. 31.

22. BELARUS CONST. § II, art. 33, ¶ 1.

23. BELARUS CONST. § II, art. 36.

24. BELARUS CONST. § II, art. 62 provides that:

far reaching than the right to counsel found in the United States Constitution.²⁵ In addition, the Belarussian Constitution makes explicit the protections of the exclusionary rule, which excludes the admission into evidence in criminal trials of materials obtained in violation of the law.²⁶

Everyone shall have the right to legal assistance in the exercise and protection of his rights and freedoms, including the right to make use, at any time, of counsel, and one's other representatives in court, before other State bodies, local government authorities, at enterprises, institutions, organizations, public associations, and in relation with officials and citizens. In cases envisaged by the law, legal assistance shall be prohibited in the Republic of Belarus.

Raising difficulties to the rendering of legal assistance shall be prohibited in the Republic of Belarus.

25. In contrast with the detailed provision of the Belarussian Constitution, the Sixth Amendment of the United States Constitution provides the sparse statement that "[i]n all criminal prosecutions, the accused shall have the right . . . to have assistance of Counsel for his defense."

26. BELARUS CONST. § II, art. 27 provides in pertinent part that "[e]vidence obtained through the violation of the law shall not be valid." In the United States, the exclusionary rule first applied to the federal courts in *Weeks v. United States*, 232 U.S. 383 (1914). The Supreme Court reached "the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; . . . [i]n holding them and permitting their use upon trial, we think prejudicial error was committed." *Weeks*, 232 U.S. at 398. It was finally held to apply to state courts as well in *Mapp v. Ohio*, 367 U.S. 643 (1961). The language in *Mapp* makes it unclear whether the exclusionary rule was constitutionally mandated or merely a prophylactic rule designed to deter wrongful conduct on the part of the government. "[T]his court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required - even if judicially implied - deterrent safeguard." *Mapp*, 367 U.S. at 647. In *United States v. Calandra*, 414 U.S. 338 (1974), the Supreme Court expressly stated that the exclusionary rule was prophylactic in nature and not constitutionally mandated. Holding that the exclusionary rule does not extend to Grand Jury proceedings, the Court stated that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Calandra*, 414 U.S. at 348. Then, the Court stated that the exclusionary rule should apply only when the deterrent effect outweighs the costs to society to having relevant evidence excluded from criminal trials. This

As one reads this list of guarantees, the immediate reaction is that the Constitution provides excellent protection for fundamental human rights. However, the Constitution contains two further provisions, Article 23 and Article 63, which provide the potential for serious erosion, if not outright evisceration, of these guarantees.

First, the provisions in Article 23²⁷ allowing the Supreme Council²⁸ to pass legislation restricting citizens' civil liberties are extremely broad. Phrases such as "to protect morality, the health of the population, and the rights and freedoms of other persons"²⁹ are extremely nebulous and easily subject to abuse. A legislature could find that virtually any civil liberty might need to be abridged in the name of morality and health. Additionally, it is a common occurrence for governments to invoke national security as a reason for abridging citizens' civil liberties. Further, *all* the civil liberties mentioned above, with the exception of the guarantee of equal protection under the law,³⁰ would appear to be subject to

interpretation of the exclusionary rule has led to serious erosion in the protection provided the accused by the exclusionary rule.

It is possible that judicial interpretation of the Belarussian Constitution may lead to the same narrowing of the application of the exclusionary rule as has occurred in the United States. However, the fact that the exclusionary rule is explicitly constitutional may provide greater protection for the accused in Belarus than exists in the United States.

27. BELARUS CONST. § II, art. 23, ¶ 1 provides that "[r]estrictions of person rights and freedoms shall be only admissible in cases stipulated by the law, in the interest of national security, public order, protection of citizen's morality and health, as well as rights and freedoms of other persons."

28. Under the previous Constitution, the legislative body was called the Supreme Soviet. This was changed to the Supreme Council in the new Constitution.

29. BELARUS CONST. § II, art. 23, ¶ 1.

30. Article 23 does not expressly exempt the equal protection provision from potential abridgment. This protection arises from the placement of these Articles relative to each other in the Constitution. The equal protection provision contained in Article 22. Because Article 22 precedes Article 23, the drafters intended that it would not be subject to the possible limitations by legislation as provided for in Article 23.

In prior drafts the provisions for limitation of Constitutional guarantees were contained in Article 22 and the equal protection guarantees were contained in Article 23. When the drafters realized that this allowed the legislature to limit equal protection under the laws, their response was to switch the position of the

abridgment. Thus, the imprecision and breadth of the language in Article 23, without any additional qualifiers, creates significant danger that a legislature could eviscerate or abolish these civil liberties pursuant to the constitutional provision.

When the possibility of legislative evisceration of civil liberties was raised, the Constitutional Commission took the position that certain civil liberties could not be restricted. The Commission noted that even in times of a state of emergency or war, certain civil liberties (those expressly mentioned in Article 63) cannot be restricted. The Commission reasoned that if these rights cannot be restricted even in times of turbulence, then, *a fortiori*, they cannot be restricted when a state of emergency or war does not exist. Thus, there is legislative history suggesting that at least some civil liberties are intended to be inviolable.³¹

However, many other important rights are not inviolable, under either Article 63³² or Article 23. These include such fundamental rights as protection against self-incrimination,³³ inviolability of one's home,³⁴ freedom to move and choose a place of residence within the republic,³⁵ freedom of speech,³⁶ freedom of assem-

two Articles under the theory that the Article allowing limiting legislation applied only to articles subsequent to it. By placing the equal protection article prior to the article allowing legislative limitations, the drafters manifested their intent that equal protection under the law not be subject to legislative limitation.

31. When I was in Minsk, in October 1993, I discussed this issue with members of the Constitutional Commission. I asked them why, if they intended these civil liberties to be inviolable, they did not simply redraft Article 23 so as to make this an express provision. The response I received was that Article 23 had already been adopted and the Commission felt it would be unwise to revisit any Articles that had already been adopted.

32. BELARUS CONST. § II, art. 63 provides that "[t]he exercise of the envisaged by the present Constitution rights and freedoms may be suspended only in the period of a state of emergency or a state of war, according to the procedure and within the limits established by the Constitution and by the law. In carrying out special measures during a period of a state of emergency, the rights envisaged in Articles 24, Articles 25 (paragraph 3), 26, and 31 of the Constitution may not be restricted."

33. BELARUS CONST. § II, art. 27.

34. BELARUS CONST. § II, art. 29.

35. BELARUS CONST. § II, art. 48, ¶ 1.

36. BELARUS CONST. § II, art. 33, ¶ 1.

bly,³⁷ and the right to elect leaders.³⁸ These civil liberties appear to possess no protection against legislative restriction.

Potential protection against improper restriction of civil liberties appears to exist in Article 60, which provides:

State bodies, officials and other persons entrusted with the fulfillment of state functions shall be obliged, within the limits of their jurisdiction, to take necessary measures for the exercise and protection of personal rights and freedoms.

These bodies and persons shall be liable for actions which violate personal rights and freedoms.³⁹

This language appears to require that the Supreme Council, in enacting legislation, must give proper deference to citizens' civil liberties. Unfortunately, this protection is illusory. Article 83 provides that the Supreme Council has the authority to "give interpretation of the Constitution and laws."⁴⁰ Thus, the Supreme

37. BELARUS CONST. § II, art. 35 provides that "[t]he freedom of assembly, meetings, street processions, demonstrations and picketing, not violating law and order and the rights of other citizens, shall be guaranteed by the State. The procedure for carrying out the above activities shall be established by the law."

38. BELARUS CONST. § II, art. 38 provides that "[c]itizens of, the Republic of Belarus, shall have the right to freely elect and be elected to State bodies in the basis of general, equal and direct suffrage by ballot."

39. BELARUS CONST. § II, art. 60.

40. It is unclear under the Constitution where the final authority to interpret the Constitution will ultimately rest. Both the Constitutional Court and the Supreme Soviet have the authority to render interpretations of the Constitution. In the Draft Constitutions, the language read that "The Supreme Soviet shall have the exclusive jurisdiction to [deal with various legislative concerns and] . . . interpret the Constitution and laws." That language, in conjunction with the Draft Legislation on the Constitutional Court, made it clear that the Supreme Soviet was envisaged as being the final authority regarding interpretation of the Constitution. My discussions with various members of the Commission lead me to believe that this is indeed where the power was intended to ultimately reside.

The Constitution, as passed, states that the Supreme Soviet . . . [shall deal with various legislative concerns and] . . . give interpretation of the Constitution and laws." Although the language giving the Supreme Soviet exclusive jurisdiction has been deleted, there is no reason to think that the ultimate intent has changed at all. The power granted to the Supreme Soviet in Article 83 to interpret the Constitution and laws resides with many other powers given to the Supreme

Council could enact laws restricting civil liberties and then rule on their constitutionality. It is extremely unlikely that the Supreme Council would enact a law pursuant to Article 83 and then deem it unconstitutional pursuant to Article 83. Indeed, one might argue that by enacting the law restricting civil liberties initially, the Supreme Council was already making a determination that such a restriction was constitutional because it is bound by this provision of the Constitution. Thus, the likelihood that the Supreme Council would later rule the restriction to be unconstitutional is virtually nonexistent. Therefore, the seeming protection afforded by Article 60 is illusory.

Secondly, Article 63 creates a greater danger to citizens' civil liberties.⁴¹ This Article provides for suspension of all civil liberties, except for those Articles expressly exempted, when there is a state of emergency or war. The language, "a state of emergency," is extremely broad and there is danger of abuse.

One can understand why certain civil liberties might be properly restricted in times of a state of emergency or war. For example, the United States Constitution expressly provides that the Writ of Habeas Corpus may be suspended in time of rebellion or invasion, if public safety requires it.⁴² Certainly, the amount of permitted censorship increases during times of war, in the name of national security. Thus, it might be appropriate to state that some limitations should be placed on freedom of expression during wartime. However, there is no reason for many other rights contained in the Belarussian Constitution to be suspended. There is no reason why the following privileges or rights should be restricted or suspended during wartime: the privilege against self-incrimination; the right to marry or raise children: Most importantly, there is no reason why the right to vote should be suspended during wartime.

Soviet that usually would be thought of as belonging solely to the legislative body. The fact that interpreting the Constitution and laws is placed with those other, normally exclusive, legislative powers implies that the deletion of the words "Exclusive authority" was not intended to work any substantial change.

41. BELARUS CONST. § II, art. 63.

42. U.S. CONST. art. I, § 9, cl. 2.

The language of Article 63 does contain one potential mitigating factor that might lessen this potential danger. Article 63 states that the above civil liberties may only be suspended within limits established by the Constitution and by law. If as a result of a state of emergency or war, a suspension of civil liberties were challenged as unconstitutional, the governmental organ⁴³ deciding the case might find that the language "within limits established by the Constitution" would require that the suspension be reasonably related to the emergency in question. Thus, suspensions lacking such a relation would be found unconstitutional and therefore invalid.

In theory this is a good idea. However, it is unlikely to occur in practice. Article 100, paragraph 18 of the Constitution provides that the President "shall have the authority to declare a state of emergency, subject to submission of this decision to the Supreme Council within three days."⁴⁴ Although the Constitution is silent on what action the Supreme Council must take and within what time frame such an action must occur, it seems apparent that the Constitution envisions ratification by the Supreme Council within a reasonable time period of time as a prerequisite for the continuance of the legal status of a state of emergency.

Assuming the Supreme Council does ratify the President's decision, the Supreme Council then has the authority, under Article 63, to suspend any or all civil liberties except those expressly excepted. Further, as stated previously, pursuant to Article 83, the Supreme Council has the authority to "give interpretation of the Constitution and laws."⁴⁵ Thus, the same body that determines the existence of a state of emergency will be drafting the legislation that restricts citizens' civil liberties. It would be highly unlikely that the Supreme Council would ratify the President's decision to declare a state of emergency, pass a law restricting or suspending

43. I use the somewhat ambiguous term "governmental organ" advisedly. As stated *supra* note 40, it is unclear where the final interpretive power will lie, although it is most likely that this power will ultimately reside with the Supreme Soviet.

44. BELARUS CONST. § IV, ch. 4, art. 100, ¶ 18.

45. BELARUS CONST. § IV, ch. 3, art. 83, ¶ 12.

civil liberties, and then decide that law was unconstitutional. Inasmuch as the Supreme Council acts as its own judge as to constitutionality of its legislation, there is no protection for citizens from decisions made by the Supreme Council to suspend civil liberties.

The decision of the Constitutional Commission to provide for some restrictions by law on citizens' civil liberties is neither inappropriate nor unprecedented. The rights of individuals must always be balanced against the needs of society. The difficult part is to find the proper balance. Too great an emphasis on individual rights leaves the society unable to protect the welfare of all its people. Too great an emphasis on societal needs creates the risk that the society will repress the fundamental freedoms of its people necessary to guarantee their individuality.

Constitutional analysis in the United States provides that certain fundamental human interests guaranteed by the Bill of Rights, such as freedom of speech and freedom of the press, can be overborne by the legislature only under the proper circumstances.⁴⁶ Where legislation restricting such a right is challenged as being unconstitutional, the enacting body must show the legislation was enacted to achieve a compelling state interest and that there were no other, less restrictive, means of achieving this compelling state

46. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (where the defendants were convicted of conspiracy to violate section 3 of the Espionage Act of 1917, ch. 30, title I, § 3, 49 Stat 219 (1917), by circulating "to men who had been called and accepted for military service" a document "alleged to be calculated" to obstruct the recruiting and enlistment service. Justice Holmes, writing for the Court, upheld the convictions and the Act with the now famous passage,

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing panic . . . [t]he question . . . whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. [emphasis added].

Id. at 51-52.

Thus, the "clear and present danger" doctrine was created as a limited restriction on freedom of expression).

interest.⁴⁷ This is a heavy burden to bear, and most legislation challenged for these reasons is struck down.⁴⁸ Nonetheless, the existence of such a provision recognizes the need to balance the rights of the individual against the needs of society. In the United States this balance is drawn to maximize protection of individual liberties while still recognizing legitimate societal needs.⁴⁹

The history, culture, and norms and present circumstances of Belarus are different from those of the United States. Many Belarussians are presently concerned about the rapid proliferation of crime. There is also great concern about and desire to prohibit pornography. Furthermore, there is the problem of dealing fairly with the large number of ethnic Russians living in Belarus. Given these concerns, one can readily understand why the Constitutional Commission might determine that the balance between individual rights and societal needs should be drawn differently from the balance drawn in the United States. However, the problem with the Constitution is that it does not truly create a balance between individual civil liberties and societal interests. Rather the language in Article 23 allows the Supreme Council to virtually eviscerate individuals' civil liberties.⁵⁰

47. JOHN NOWAK & RICHARD ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991).

48. *But see* *Korematsu v. United States*, 323 U.S. 214 (1944). (This is the only case in which the Court held that intentional discrimination against those individuals of Japanese ancestry was due to fear of disloyalty was enough of a compelling interest during a time of war).

49. NOWAK & ROTUNDA, *supra* note 46, at § 11.4 and § 13.4.

50. When I was in Belarus and consulting with the Constitutional Commission on behalf of CEELI, I raised this problem. I suggested two alternative amendments that would strengthen protection of an individual's civil liberties. One amendment would have maximized such protection and was based on constitutional principles as found in the United States. It would read as follows:

Neither the [Supreme Soviet], nor the President, nor the Government of Belarus, nor any agency thereof may restrict, limit, or substantially burden the exercise of any constitutionally protected right or liberty except to the extent actually necessary to fulfill or achieve a compelling national interest. Further, the right of any person or organization to express or advocate any political, religious, cultural or other point of view, may be limited only under circumstances in which such expression

One might argue that to be concerned about such actions on the part of the Supreme Council is to attribute *mala fides* to it. Certainly, one might say, the people should be able to trust the Supreme Council not to take such actions. Indeed, one would hope that the Supreme Council would only act in good faith and would not take action to eviscerate civil liberties. My point is not that the Supreme Council cannot be trusted to protect civil liberties, but rather that it is not wise to give the Supreme Council the ability to abrogate them. There is no need for the Supreme Council to have such power and to give it to the Supreme Soviet is to take an unnecessary risk.⁵¹ Given the language in Article 23,⁵² protection of civil liberties in the Constitution becomes reliant solely on the discretion of the Supreme Council. In times of present economic and political turmoil, temptations become too great for the state to restrict civil liberties in the name of security. Therefore, stronger protection for civil liberties should be created.

or advocacy poses a genuine and serious risk of reasonable immediate danger to a compelling national interest. The courts shall have power to invalidate as unconstitutional any restrictions, limitations, or burdens on constitutionally protected rights or liberties that violate these principles.

The second amendment I suggested would have adopted an intermediate position between the United States' approach and that proposed in the Draft Constitution. This language was actually suggested by Henry Bourguignon, my predecessor as a CEELI consultant and was drawn from the European Convention on Human Rights. It would have inserted language that would have made Article 23 read as follows (inserted language in italics):

Restrictions of citizens' rights and freedoms is (sic) only permissible *to the extent necessary in a democratic society* in cases stipulated by legislation, in the interest of national security, public order, protection of citizens' morality and health, as well as rights and freedoms of other persons.

Neither of these amendments were adopted by the Constitutional Commission. I believe this makes it clear that the Commission intends the balance to be drawn precisely where it is.

51. It is precisely this danger that creates the need for separation of powers in the government. It is the failure of the Belarus Constitution to effectively separate judicial functions from legislative functions that raises the danger to civil liberties.

52. BELARUS CONST. § 10, art. 23, ¶ 1.

B. The Duties of the Government

Section II of the Constitution contains several guarantees that the State must provide for its citizens. The Constitution provides that the people shall have a work week not longer than forty hours,⁵³ the right to free health care,⁵⁴ the right to a healthy environment,⁵⁵ the right to social security and disability benefits,⁵⁶ the right to housing,⁵⁷ and the right to education.⁵⁸ It appears that, by virtue being enumerated in the Constitution, the State has a legal obligation to carry out these commands. However, the enforcement of these duties is somewhat problematic in that the state must spend money in order to satisfy these guarantees. If the state does not have the requisite funds, there is no effective remedy available when the state fails to meet these goals.

Guaranteeing free health care, social security, adequate housing and free education is laudable. However, it is also expensive. Concerns must arise as to the ability of the State to pay for these enumerated guarantees. The inclusion of these guarantees is certainly understandable, in that one can certainly believe these ideals are essential to maintaining a humane and civilized republic. However, the problem with their inclusion is that they are unenforceable when the state has insufficient funds. It is never a good idea to have unenforceable guarantees in a Constitution.

53. BELARUS CONST. § II, art. 43 provides that “[a]ll working people shall have the right to rest. For employees, this right shall be secured by the establishment of a working week of no longer than 40 hours, by shorter-time night work, by the granting of annual paid leaves and weekly rest-days.”

54. BELARUS CONST. § II, art. 45 provides in pertinent part that “[c]itizens of the Republic of Belarus shall be guaranteed the right to health care, including free treatment in state health care institutions.”

55. BELARUS CONST. § II, art. 46 provides that “[e]veryone shall have the right to favorable environment and to compensation for damage caused by violation of this right.”

56. BELARUS CONST. § II, art. 47 provides in pertinent part that “[c]itizens of the Republic of Belarus shall be guaranteed the right to social security in old age, in case of illness, disability, loss of fitness for work and loss of a breadwinner and in other cases stipulated by the law.”

57. BELARUS CONST. § II, art. 48.

58. BELARUS CONST. § II, art. 49.

The history of Belarus under the Soviet Union makes the existence of unenforceable guarantees an especially harmful provision. The Soviet Constitution, on paper, was a marvelous document with all sorts of desirable protections and guarantees for its citizens. Unfortunately, none of these promises was kept. Over time, the people of the Soviet Union, including those in Belarus, came to regard the Constitution as a meaningless scrap of paper, whose promises were worthless. Similarly, if the Belarussian Constitution contains guarantees that the State cannot keep, the risk exists that the people, jaded by their experience with the Soviet Constitution, will view the Belarussian Constitution as another meaningless scrap of paper. A new republic, struggling to create a state governed by law, cannot afford a Constitution with worthless promises.

C. The Duties of Citizens

The third part of Section II of the Constitution deals with duties that the citizens owe the state. This portion of the Constitution contains some unexceptionable provisions and some potentially troubling provisions. The unexceptionable provisions include the duty to pay taxes⁵⁹ and serve in the military.⁶⁰ Although one might not expect to find such provisions in a constitution, but rather in legislation, their presence in the Constitution creates no problem.

In contrast to these unexceptionable provisions, however, are the following troubling provisions. Article 50 states in pertinent part that "Putting an insult upon national dignity shall be prosecuted by law."⁶¹ Article 53 states, "Everyone must respect the dignity, rights, freedoms, and legitimate interests of others." Both of these provisions are understandable and even laudable. Despite its historical origins, Belarus is a new republic, striving to deal with problems of more than one ethnic group residing in the Republic. One can readily desire to see constitutional imperatives that the

59. BELARUS CONST. § II, art. 50.

60. BELARUS CONST. § II, art. 57, ¶ 1.

61. BELARUS CONST. § II, art. 50.

new republic be treated with the respect it deserves and that all citizens, regardless of their background, be treated with dignity.

However, these provisions pose a serious danger of creating restrictions on freedom of speech due to the broad manner in which they are drafted. Much speech that occurs is critical of political institutions and other people. If someone engages in satire about the government or the role of Belarus in the world, is that person insulting the national dignity? If someone tells a joke based on a person's ethnicity, has that person failed to respect the dignity of others? Are these actions punishable under Articles 50 and 53 or are they protected by the freedom of speech provisions in Article 33?⁶²

These are difficult issues to resolve. Belarus is not alone in wrestling with these issues. A great deal of struggle currently exists in the United States over the extent to which "hate speech," speech

62. An example of the potential for abuse can be demonstrated by the following anecdote that occurred while I was in Minsk. On my first trip to Minsk, as a CEELI consultant, I went out to dinner with a number of people. They included the CEELI liaison at the time, Cheryl Fackler Hug, her husband, a number of Belarussians and others. I related a story about how I had taught a business course to Russian students in Moscow, the previous year and that they had thrown a party for me the day before I was to return to the United States. Towards the end of the party, one of my students brought out a guitar and asked if I knew any Russian songs. My knowledge was non-existent. Similarly, my students' knowledge of English songs was limited. It turned out that the only two songs to which everyone knew the words were "Row, row, row your boat" and "Yellow Submarine" by the Beatles. We ended up singing "Yellow Submarine" for an interminably long time that afternoon.

My colleagues in Minsk thought this a delightful story and we ended up singing "Yellow Submarine" quite loudly in the most fashionable restaurant in Minsk. Singing "Yellow Submarine" at this restaurant became a tradition, to be enacted each time I visited Minsk. The last time that I traveled to Minsk we went to this restaurant and, at the end of dinner, we sang "Yellow Submarine" quite loudly. Apparently, some people were irritated by this because they started to sing Belarussian national anthem in an attempt to drown us out. Not to be outdone, we increased our volume until we had drowned them out.

Under the new Constitution, could we have been arrested for abusing the national dignity? Drowning out the Belarussian national anthem would certainly have been interpreted that way, although a number of patriotic Belarussians were among those singing "Yellow Submarine." Even worse, the uncertainty surrounding such a question would certainly inhibit their (my) actions.

denigrating to people on the basis of their race, religion or ethnicity, should be protected in the name of freedom of speech.⁶³ Thus, it is not surprising that such provisions appear in the Belarussian Constitution. Nonetheless, the inclusion of such broad language in Articles 50 and 53 presents a potential threat to the freedom of speech.

Summary of Section II

There is a great deal of good work encompassed in Section II of the Constitution. Its provisions show a determination on the part of the Constitutional Commission to protect civil liberties. The problems regarding protection of civil liberties arise primarily not out of inappropriate conceptions of what liberties should be guarded, but rather out of problems arising from the portion of the Constitution dealing with separation of powers.

The section regarding the duties of the government contains problems that are not insuperable. Many of the problems arise out of good intentions and the problems inherent in trying to insure a humane society in turbulent times that are not conducive to humanity.

II. SEPARATION OF POWERS IN THE CONSTITUTION OF THE REPUBLIC OF BELARUS

Article 6 of the Constitution states that “[t]he State shall be founded on the principle of separation of powers: legislative, executive and judicial. State bodies, within the limits of their authorities, shall act independently and cooperate with one another, and restrain and counterbalance one another.”⁶⁴ The first sentence establishing separation of powers, is straightforward separation of

63. In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), the Court held that hate speech is protected by the First Amendment. However, the debate about whether this decision is correct continues to rage, because many believe that hate speech should not be protected.

64. BELARUS CONST. § I, art. 6.

powers. It is the attempt to implement the principles espoused in the second sentence that give rise to trouble.

Section IV of the Constitution which provides for the implementation of the legislative, the executive and the judicial power, was perhaps the most controversial portion of the Constitution as it was being enacted. Controversy raged primarily over whether Belarus should have a President, and if so, how strong should the President's powers be. The other area of controversy, which was of great concern to a number of the deputies present, focused on who should have the ultimate power to interpret the constitution and laws.

A. The Role of the President in the Constitution

The Constitution contains provisions for a strong President in that the President is the Head of State and the head of the executive branch.⁶⁵ The President has the authority to: create and abolish ministries (apparently without approval from the Supreme Council);⁶⁶ appoint judges;⁶⁷ conduct negotiations with foreign nations and sign treaties (to be ratified by the Supreme Council);⁶⁸ declare a state of emergency (subject to the approval of the Supreme Council);⁶⁹ veto legislation (subject to an override by the

65. BELARUS CONST. § IV, ch. 4, art. 95 provides that the President is the "Head of State and the Executive."

66. BELARUS CONST. § IV, ch. 4, art. 100, ¶ 3 provides that the President shall "establish and abolish ministries, state committees and other central authorities of the Republic of Belarus."

67. BELARUS CONST. § IV, ch. 4, art. 100, ¶ 10 provides that the President shall "appoint the judges of the Republic of Belarus, other than those whose election falls within the jurisdiction of the Supreme Council."

68. BELARUS CONST. § IV, ch. 4, art. 100, ¶ 16 provides that the President shall "conduct negotiations and sign international treaties, appoint and recall diplomatic representatives of the Republic of Belarus in foreign states and in international organizations."

BELARUS CONST. § IV, ch. 3, art. 83, ¶ 12 provides that the Supreme Council shall "ratify and denounce international treaties to which the Republic of Belarus is a party."

69. BELARUS CONST. § IV, ch. 4, art. 100, ¶ 18 provides that:

The President of the Republic of Belarus shall . . . in the event of a natural calamity, catastrophe, as well as disorder involving violence or

Supreme Council);⁷⁰ act as the Commander-in-Chief of the Armed Forces and Civil Defense units in Belarus (the Supreme Council has the authority to declare war);⁷¹ as well as exercise other powers given to him by the Constitution and legislation.⁷²

A number of deputies in the Supreme Soviet were leery of this provision for a strong President. They feared that giving one person such strong authority creates a danger of that person usurping all governmental power and become a dictator.⁷³ The deputies' fears were fueled by Russian President Boris Yeltsin's confrontation with Parliament in October of 1993. A large number of deputies were convinced that if Yeltsin could wield power of this sort in Russia, a Belarussian President with strong powers, would be just as likely to start utilizing them in an autocratic manner.⁷⁴ The Constitutional Commission was aware of the op-

the threat of violence on the part of a group of individuals or organizations, which endanger human life and health or jeopardize the territorial integrity and existence of the State, declare a state of emergency on the territory of the Republic of Belarus or in selected localities, thereof, with the subsequent submission of the decision, no later than within three days, for the approval of the Supreme Council of the Republic of Belarus.

70. BELARUS CONST. § IV, ch. 4, article 100, ¶ 20 provides that the President shall "sign laws and have the right to return a law to the Supreme Council, within a ten days' period, starting the day he receives the law, with his objections for renewed discussion and voting. If the Supreme Council upholds the decision it earlier adopted, by a majority of no less than two-thirds of the elected deputies, the President is obliged to sign the law within three days; if the law is not returned within the envisaged term, the law is regarded as signed."

71. BELARUS CONST. § IV, ch. 4, art. 100, ¶ 24 provides that the President shall "be the Commander-in-Chief of the Armed Forces of the republic of Belarus."

BELARUS CONST. § IV, ch. 3, art. 83, ¶ 15 provides that the Supreme Council shall "declare war and conclude peace."

72. BELARUS CONST. § IV, ch. 4, art. 100, ¶ 26 provides that the President shall "exercise other powers entrusted to him by the Constitution and laws."

73. I use the word "dictator" intentionally. In numerous discussion with leaders of various political parties, they expressed their fears that a strong President would become a dictator.

74. It was not just the deputies that were convinced of this likelihood. On October 30, 1993, I gave a lecture at European Humanitarian University in Minsk. My lecture explored the United States Constitution and how it compares

position to a strong President and prepared an alternative version of the President's role in which his powers were significantly reduced. The Commission was prepared to offer this alternative in the event that it appeared that a provision calling for a strong President would not be adopted. Notwithstanding these concerns, the Constitution was passed containing a strong presidency.⁷⁵

The deputies' concerns about the possible abuse of power by a strong President are somewhat justified. Belarus does not have a strong culture of law.⁷⁶ In a culture of law, the people expect and demand that their leaders will follow the law. Because the people expect that the leaders will follow the law, the government is constrained from acting illegally. Such actions would forfeit the government's political legitimacy. While a strong culture of law does not guarantee that abuses of power will not occur, it makes it more likely that any abuses will be less frequent and far more limited.

Compare, for example, the Watergate scandal of President Richard Nixon in the United States in the 1970's with President Yeltsin's actions in Russia. In the 1972 presidential election, the

with the Belarussian Constitution. At the end of the lecture, I fielded questions. A number of people told me they were convinced that a strong presidency would result in a dictatorship. These people wished to have a parliamentary republic with no President at all.

75. Given the strength of the fears of a strong Presidency, many were surprised that a Constitution with a strong Presidency was passed. The reason for this may have been political in nature. At the time that the Constitution was being drafted, the most powerful political party in the Supreme Soviet was the Belarus Group, a very conservative group of deputies. At the time that I first went to Minsk as a CEELI consultant, in January of 1993, the Belarus group was opposed to the passage of a new constitution and a strong presidency in any new constitution that might be passed. By October of 1993, the Belarus Group was strongly in favor of both the Constitution and a strong Presidency.

The reason for this change of events appears to have been quite pragmatic in nature. By October of 1993, it appeared that the Belarus Group would win any Presidential election that would take place. Therefore, it was in their interest to ensure a new Constitution with a strong Presidency so as to maximize their own power. Of course, things did not turn out quite as the Belarus Group had planned. Their candidate, Vyacheslav Kebich was soundly defeated by a reform candidate, Alexander Lukashenko.

76. *See supra* note 1.

Republican Party attempted to illegally break into the offices of the Democratic Party, for the purpose of installing eavesdropping devices. Although President Nixon denied that he had any part in this illegal action, questions continued to arise as to whether he participated in planning or ordering it, and whether he was trying to cover up his participation. Ultimately, a sufficient demand that he be impeached arose from the people of the United States, such that Nixon was forced to resign as President. The culture of law in the United States required that the President not engage in illegal activities. When it seemed likely that he had engaged in them, the President was forced to resign.

In comparison, when Yeltsin used the armed forces to confront and quash Parliamentary opposition, in clear violation of the Russian Constitution, there was no public consensus that he resign for having violated the law. To the contrary, many Russians believed that he had simply done what was necessary. Rather than having a culture of law, the Russian people have a culture of power. Yeltsin was not constrained from using the armed forces against Parliament. Rather, he risked losing control if he failed to exercise power effectively so as to crush the opposition.

Yeltsin's actions would be unthinkable in the United States. This is so because the United States has a strong culture of law, dating back to the beginning of the country. Yeltsin's actions were accepted by the Russian people because such a culture of law is not yet present in Russia.

I traveled to Minsk just after Yeltsin crushed the Parliament. Every political leader I talked with was concerned about the likelihood of such an event occurring in Belarus if there was a strong President. As part of the discussions, I always raised the point that it is only the culture of law that precludes the abuses of power by a strong president. I pointed out that in the United States, the Constitution contains no mechanism by which the Supreme Court can force the Congress and President to abide by its decisions. The reason that these branches of government abide by the Supreme Court's decisions is the strong sense of political legitimacy possessed by the Supreme Court. Absent the fact that the people accept the Supreme Court as a legitimate form of government,

there is no means by which the Supreme Court can enforce its decisions.

Similarly, I told Belarussian leaders that if President Clinton had sufficient support from the armed forces, the realities of power would mean that President Clinton could call out the armed forces against a recalcitrant Congress, the way Yeltsin had done against Parliament. Each leader to whom I made this comment reacted precisely the same way. He would appear shocked and state something on the level of "But it is unthinkable that this would happen in the United States." I would quickly agree, adding, that what makes such an idea so unthinkable in the United States is the culture of law present there.

The people in Belarus do not yet have the faith that law will govern the country. In the absence of a culture of law, there is always the danger that someone will gain the support of the armed forces and utilize force to impose his will. Belarussian leaders recognize this problem. However, it is important to recognize that there is nothing unique about a President which makes it more likely that he would establish this base of power than a Prime Minister would (if Belarus were to adopt a Parliamentary system). It is the absence of a culture of law that makes the abuse of power possible and it can occur in any form of government.

The leaders in Belarus recognize this fact. Indeed, in all of the talks that I had with leaders of political parties, the one issue on which everyone was in agreement was the need to establish a culture of law. One of the first steps in establishing such a culture is to create a strong, independent judiciary. With that in mind, let us explore the role of the judiciary in the Constitution.

B. The Role of the Judiciary in the Constitution

Perhaps the most important thing to note about the role of the judiciary is that it is not clear where the ultimate authority to interpret the law and the Constitution lies. Article 109 states "Judicial power in the Republic of Belarus shall be vested in courts."⁷⁷ The Constitution provides for a Supreme Court, a

77. BELARUS CONST. § IV, ch. 5, art. 109, ¶ 1.

Supreme Economic Court — which will have jurisdiction over specialized types of cases — and lower courts established by legislation.⁷⁸ Traditionally, “judicial power” is considered to include the authority to determine the constitutionality and validity of legislative acts. Article 109 would therefore appear to vest that authority in the courts.

However, Article 83, ¶4 provides in pertinent part that the Supreme Council shall “give interpretation of the Constitution and laws.”⁷⁹ Thus, Article 83 would appear to give some portion of the judicial power to the Supreme Council as well as the Courts.

Complicating this is the fact that the Constitutional Court, which is also supposed to determine whether governmental acts accord with the Constitution, is not placed in Section IV, which establishes the role of the executive, legislature and judiciary, but in Section VI, which is entitled “State Control and Supervision.” As a result of its placement in this section of the Constitution, the Constitutional Court is not considered to be part of the judiciary. Rather, it is intended to perform a supervisory function over the actions of the rest of the government. Its functions do not include resolving disputes which involve the Constitution that may arise between private parties or between the government and private parties.

This tripartite arrangement distributes power between the branches of the government as follows. Assume a lawsuit is brought before a lower court in which the constitutionality of an act or law is implicated. The lower court, upon determining that a constitutional issue is present, will certify the question to the Supreme Court. The Supreme Court will then determine whether

78. The provisions for the Supreme Court and Supreme Economic Court are interesting. Neither court is expressly created by any Article in the Constitution. Rather, the only mention of these courts is found in BELARUS CONST. § IV, ch. 3, art. 83, ¶ 7, which provides in pertinent part that the Supreme Council shall “elect the Supreme Court of the Republic of Belarus, the Supreme Economic Court of the Republic of Belarus” and BELARUS CONST. § VI, ch. 6, art. 127, ¶ 1 provides in pertinent part that “[t]he Constitutional Court, on proposals of the . . . Supreme Court, the Supreme Economic Court . . .” shall decide on various constitutional issues.

79. BELARUS CONST. § IV, ch. 3, art. 83, ¶ 4.

the Constitutional Court should decide the issue. The question that the Supreme Court certifies to the Constitutional Court will be phrased in general conceptual terms, dealing with whether the challenged governmental action is consistent with the Constitution. It will not be phrased in terms specific to the dispute in which the parties raised the issue. This is so because the Supreme Court, for purposes of efficiency, will wait until the issue has arisen more than once before certifying it to the Constitutional Court.⁸⁰ However, the Supreme Council still has the authority to determine the constitutionality of the act or law in question.

This arrangement creates two problems. First, no citizen is guaranteed that his or her challenge of the constitutionality of an act or law will ultimately be heard. The citizen may bring an action in the lower court, alleging the unconstitutionality of a government action, only to have the Supreme Court refuse to certify the issue to the Constitutional Court. Second, it destroys the concept of separation of powers regarding the judiciary, because the legislature will be able to rule on the constitutionality of legislation it enacts or actions it takes.

Allowing the citizenry of a country to challenge the constitutionality of a governmental action is desirable for two compelling reasons. First, the vast majority of unconstitutional governmental actions impact directly on private citizens. Thus, in order to ensure that citizens will be able to obtain redress for wrongs done by the government, the citizens should be able to bring actions challenging governmental action they believe violates their constitutionally protected rights. Second, as a matter of efficiency,

80. In terms of traditional United States Constitutional jurisprudence, this recasting of the issue into a concept independent of the facts under which it arise would violate the requirement that there be a case or controversy, as required in Article III of the United States Constitution. Under the Belarussian Constitution, this is not a concern for two reasons. First, the Belarussian Constitution has no such case or controversy requirement. Second, the Constitutional Court is intended to perform a supervisory function over the actions of the rest of the government and not resolve disputes which must involve the Constitution that may arise between parties. Thus, the Constitutional Court will resolve the constitutional question and then the Supreme Court or lower courts will apply this resolution to the cases in which they initially arose.

it makes sense to give citizens the right to bring actions challenging the constitutionality of governmental actions. Giving citizens this right allows them to use their private resources to protect their rights. Further, they are much more likely to be especially watchful of their rights than the government. It is for these reasons that many other European countries having a Constitutional Court allow citizens to bring actions challenging the constitutionality of governmental action, either directly or indirectly.⁸¹

Given that the Belarussian Constitution puts a great emphasis on protecting its citizens rights,⁸² and that the Constitutional Court is the only court competent to determine constitutionality of a governmental action, it would seem imperative that citizens be guaranteed access to the Constitutional Court, either by bringing the action in that court initially or through a right of appeal. Although many members of the Constitutional Commission expressed sentiments agreeing with this position, it was unlikely that such a result would be reached. Members of the Commission with whom I discussed this issue stated that there was a consensus in the Supreme Soviet that at the present time there are probably not enough judges knowledgeable about constitutional issues to allow them to certify issues directly to the Constitutional court. It is for this reason that the Supreme Court will act as a filter, determining which cases shall go the Constitutional Court and

81. For example, the German Constitution allows citizens to invoke the jurisdiction of the Constitutional Court when rights deemed to be basic have allegedly been violated. The Spanish Constitution also allows citizens to lodge appeals regarding fundamental civil rights. These Constitutions make such allowances because protecting the basic or fundamental rights of the citizens is considered a primary purpose in creating such a court. Indeed, the decision in this area make up major portions of these courts' workload. *See* IGOR I. KAVASS, *SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES* (1989), for an in depth discussion of Constitutional Courts in Europe.

82. The Preamble to the Belarussian Constitution states: "We, the People of the Republic of Belarus . . . striving to assert the rights and freedoms of every citizen of the Republic of Belarus." Article 21 continues this theme, stating that "The Supreme Goal of the State shall be to secure the rights and freedoms of the citizens of the Republic of Belarus."

which shall not. The members of the Commission all stated their hope that in a relatively short time period, this procedure can be changed.

The second problem created by the provisions of the Constitution regarding the Constitutional Court is the fact that Article 83 states that the Supreme Council shall have authority to interpret the Constitution and laws. This provision results in a violation of the Separation of Powers Doctrine. As a result, the legislature, which enacts the laws, also has the power to interpret them.

The requirement of separation of powers is intended to prevent any one branch of the government from gaining too much power. When one branch acquires too much power, there is the danger of abuse with no means of correcting the abuse. That danger exists under Article 83. The Supreme Council could enact a law, and in response to a challenge to its constitutionality, then determine the statute is constitutional. Indeed, it would seem highly unlikely that the same legislature that enacted the statute would find the statute unconstitutional. Article 83 potentially precludes statutes from being examined by a neutral party, such as the judiciary. Thus, there is no possibility of correcting an abuse resulting from a statute. As stated earlier, one of the dangers created by this arrangement is that the Supreme Council could abolish or restrict citizens' civil liberties and then determine that these restrictions were constitutional.⁸³ There would be no method of challenging this determination. Therefore, the continued existence of civil liberties potentially rests in one branch of government, without any counterbalancing force.

The provision in Article 83 giving the Supreme Council the authority to interpret the Constitution and laws is probably the biggest flaw in the Constitution. During the drafting of the Constitution, an amendment was proposed that would have eliminated this language. This amendment was rejected by the Supreme Soviet. Thus, it is clear that the Supreme Soviet was intent on keeping this power for itself.

83. See text accompanying *supra* note 31.

CONCLUSION: AN ASSESSMENT OF THE CONSTITUTION

When one writes an article analyzing a document, there is a tendency to find flaws in that document. The resulting article thus becomes disproportionately critical. The Belarussian Constitution is not perfect. This article has pointed out the major flaws that exist. However, I am glad that the Constitution was passed.

When I visited Belarus in December, 1992, to counsel the government in drafting its new constitution, I was asked to prepare a written report on the then current draft. I started my report by saying that it was clear that the then current draft was the result of much hard work and compromise. Since that report, the Constitution underwent many revisions and each revision improved it.

I do not believe that it is likely that any country can write a perfect constitution. Any constitution will be subject to compromise. The fact that the Belarussian Constitution is not perfect does not mean that its passage was a mistake. Although I would like to see the provisions protecting civil liberties strengthened, this Constitution is still a positive step towards ensuring that protection.

With the dissolution of the Soviet Union and the subsequent independence of the Republic of Belarus, it was clear that the old Soviet Constitution no longer had any political legitimacy.⁸⁴ It was necessary to replace it with a constitution that has legitimacy. I believe that, although it is not perfect, the Constitution is one under which freedom has a chance to flourish. That, in the final analysis, is what the struggle for independence is all about.

In October, 1993, just before I returned to the United States, I had the pleasure of having dinner with Michael Chudakov, a

84. Not only did the Soviet Constitution lack legitimacy, there are many members of opposition parties who believe that the Supreme Soviet that passed the Constitution lacks legitimacy as well because its members were reelected during the reign of the Soviet Union. Thus, the opposition takes the position that any Constitution passed by the Supreme Soviet lacks political legitimacy. For those people, the only way a new Constitution will be legitimate is if there are elections for a new Supreme Soviet and the new Supreme Soviet adopts a Constitution.

member of the Constitutional Commission, and his wife. Towards the end of the evening, Mr. Chudakov took out his bank book, in which he had approximately 10,000 rubles. He looked at me soberly and stated, "Two years ago, this would have bought a new car. Today, it hardly buys a sausage." Then his face brightened and he said, "But it is worth it to live under freedom."

I believe that passing this Constitution is a first step towards ensuring that freedom. May you live under freedom always, Michael.